

DATE: April 10, 1995

CASE NO.: 93-INA-00544

In the Matter of:

WATKINS-JOHNSON COMPANY,
Employer

On Behalf of:

KANG-WOO LEE,
Alien

Appearance: Jack Kaiser, Esq.
For the Employer

Before: Clarke, Huddleston and Williams
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(14) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182(a)(14) (1990) ("Act"). The certification of aliens for permanent employment is governed by § 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,¹ and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On August 16, 1992, Watkins-Johnson Company ("Employer") filed an application for labor certification to enable Kang-Woo Lee ("Alien") to fill the position of Process Engineer (AF 35). The job duties for the position are:

Develop new APCVD oxide thin film process applications on a WU-TEOS999 system for contact dielectric, intermetal oxide, spacer oxide, passivation, and trench fill semiconductor device production use. Analyze thin film properties using SEM, MRL annealing furnace, Flexus stress system, Prometrix thickness measurement, Peak instruments WDS dopant measurement, Tencor particle measurement systems and correlate to deposition conditions. Optimize system parameters for specific consumer applications and document performance to characterize the equipment in comparison to historical results and generate improvements. Generate and compile data into internal process R & D reports, application notes, technical papers, training procedures, and operation manuals. Make presentations at customer sites regarding new process applications and provide process training. Test prototype hardware and software and determine modification necessary for process development and production application.

The requirements for the position are:

A Masters of Science Degree in the field of Physics, over two years of experience, and knowledge of SEM, MRL annealing furnace and Flexus stress systems. Ability to operate Prometrix thickness measurement, Peak instrument WDS dopant measurement and Tencor particle measurement systems.

The CO issued a Notice of Findings on February 17, 1993 (AF 29), proposing to deny certification on the grounds that adequate documentation was not provided by the Employer to show that the Alien possessed minimum requirements of 2+ years of experience in the duties of the job offered, and possessed the other specialized requirements of knowledge prior to his hiring in violation of 20 C.F.R. § 656.21(b)(5). In addition, the CO also proposed to deny certification on the grounds that the Employer's job requirement of a Masters of Science in Physics appears to

¹ All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

be unduly restrictive and tailored to the Alien's background in violation of 20 C.F.R. § 656.21(b)(2)(i)(A).

Accordingly, the Employer was notified that it had until March 24, 1993, to rebut the findings or to cure the defects noted.

In its rebuttal, dated March 22, 1993 (AF 19), the Employer's Counsel contended that the Alien possessed the special requirements for the job and 2+ years of experience prior to his hiring. A letter from the Alien's previous employer, Samsung Electronics, was provided as proof of the contention. In addition, the Employer's Counsel contended that a Masters of Science in Physics is the appropriate academic requirement for the position, and included a detailed letter from the Employer indicating why such a degree is required.

The CO issued the Final Determination on April 2, 1993 (AF 11), denying certification because the Employer failed to adequately document the minimum requirements of the job and that the Alien possessed 2+ years of experience in the job offered, or the special knowledge required for the job in violation of § 656.21(b)(5). In addition, the CO found that the job requirement of a Masters Degree of Science in the field of Physics appears to be unduly restrictive and tailored to the Alien's background in violation of 20 C.F.R. § 656.21(b)(2)(i)(A).

On April 26, 1993, the Employer requested review of the Denial of Labor Certification (AF 1), and the CO forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

Counsel for the Employer filed a brief on October 22, 1993.

Discussion

An employer must show that U.S. applicants were rejected solely for lawful, job-related reasons. 20 C.F.R. § 656.21(b)(6). Furthermore, the job opportunity must have been open to any qualified U.S. worker. 20 C.F.R. § 656.20(c)(8). Therefore, an employer must take steps to ensure that it has obtained lawful, job-related reasons for rejecting U.S. applicants, and not stop short of fully investigating an applicant's qualifications. The burden of proof for obtaining labor certification lies with the employer. 20 C.F.R. § 656.2(b).

Although the regulations do not explicitly state a "good faith" requirement in regard to post-filing recruitment, such a good-faith requirement is explicit. *H.C. LaMarche Enterprises, Inc.*, 87-INA-607 (Oct. 27, 1988). Actions by the employer which indicate a lack of good-faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are thus a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient U.S. workers who are "able, willing, qualified and available" to perform the work. 20 C.F.R. § 656.1.

The issues in this case are whether the Employer provided adequate documentation of the actual minimum job requirements, and whether the job requirement of a Masters Degree in Physics is unduly restrictive and tailored to the Alien's background.

Actual Minimum Job Requirements:

An employer violates § 656.21(b)(5) if it hired the alien with lower qualifications than it is now requiring and has not documented that it is now not feasible to hire a U.S. worker without that training or experience. *Capriccio's Restaurant*, 90-INA-480 (Jan.7, 1992); *Office-Plus, Inc.*, 90-INA-184 (Dec. 19, 1991). An employer must show that it has not previously hired personnel for the position who do not possess the requirements specified in the labor certification application. *Texas State Technical Institute*, 89-INA-207 (Apr. 17, 1990).

In the application, posting, and newspaper ads the Employer stated the requirements of the position were over two years of experience in "knowledge of SEM, MRL annealing furnace and Flexus stress systems," and "ability to operate Prometrix thickness measurement, Peak instrument WDS dopant measurement and Tencor particle measurement systems."

In Employer's rebuttal, a letter dated February 24, 1993, was provided from Alien's former employer, Samsung Semiconductor, stating specifically the Alien's work experience (AF 26). The letter was signed by Mr. Young-Il Lim, Manager of Line Planning, and stated that the Alien had worked as CVD process engineer at the Kihung plant Fab.3 of Samsung Semiconductor Co. in Korea from March 1987 to August 1990. Mr. Lim further stated that the Alien had:

. . . developed Thin film process application on 1M, 4M DRAM devices using Genus 8700 of Genus for LPCVD, P-5000 of Applied Materials and ASM-1 of ASM for PECVD, and WJ-999 of Watkins-Johnson for APCVD and analyzed Thin films using SEM, Flexus Stress Gauge, Tencor Particle Measurement, Prometrix Thickness Measurement, TEL and MRL Diffusion Furnace, and FTIR and WDS Dopant Measurement and conducted Joint development work with R & D for 16 M DRAM production as a[n] Assistant Manager of Fab.3 CVD Department.

In the Notice of Findings and the Final Determination, the CO cites *Integrated Software Systems, Inc.*, 88-INA-200 (July 6, 1988) for the proposition that the Employer must document that the Alien has 2+ years of experience in the duties of the job offered (AF 12, 30). In the Final Determination, the CO stated that the Employer had failed to respond to the request in the Notice of Findings that adequate documentation be provided to show that the Alien had the required experience and special knowledge prior to being hired (AF 13-14). We disagree, finding that the letter from his former employer is sufficient to establish that the Alien was qualified for the position, when hired, as the result of 2+ years of experience gained at Samsung Semiconductor of Korea as CVD process engineer.

Therefore, we reject the CO's finding that the Employer has not provided adequate documentation of the Alien's required experience and that § 656.21(b)(5) has been violated.

Requirement Unduly Restrictive:

Section 656.21(b)(2) proscribes use of unduly restrictive requirements in the recruitment process. The reason unduly restrictive requirements are prohibited is that they have a chilling effect on the number of U.S. workers who may apply for, or qualify for, the job opportunity. The

purpose of § 656.21(b)(2) is to make the job opportunity available to qualified U.S. workers. *Venture International Associates, Ltd.*, 87-INA-569 (Jan. 13, 1989) (*en banc*). Where employer cannot document that a job requirement is normal for the occupation, or that it is included in the Dictionary of Occupational Titles (DOT), or the requirement is for a language other than English, involves a combination of duties, or is that the worker live on the premises, the regulation at § 656.21(b)(2) requires that the employer establish business necessity for the requirement.

The Board defined how an employer can show "business necessity" in *Information Industries, Inc.*, 88-INA-82 (Feb. 9, 1989) (*en banc*). The *Information Industries* standard requires that the employer show that the requirement bears a reasonable relationship to the occupation in the context of the employer's business; and, that the requirement is essential to performing, in a reasonable manner, the job duties as described by the employer. Failure to establish business necessity for an unduly restrictive job requirement will result in the denial of labor certification. *Robert Paige & Associates, Inc.*, 91-INA-72 (Feb. 3, 1993); *Shaolin Buddhist Meditation Center*, 90-INA-395 (June 30, 1992).

The position of CVD Process Engineer does not appear in the DOT. In the Notice of Findings and Final Denial, the CO stated that the degrees of Chemical Engineer, Electrical and Electronic Engineer, and Metallurgical, Ceramic, and Materials Engineer provided the background necessary to perform the job duties (AF 13, 31).

In its rebuttal, the Employer included a March 8, 1993, letter from Larry Bartholomew, its Manager of the APCVD Field Process (AF 27-28). Mr. Bartholomew stated that the requirement of a M.S. Degree in Physics is a business necessity, and not atypical in the industry, "due to the very narrow scope of the advanced semiconductor process technology addressed." He also stated that candidates with M.S. degrees in Chemical Engineering were properly excluded because "[t]his position requires understanding of semi-conductor device physics and not the knowledge of manufacturing chemicals or other products in bulk that chemical engineers have instead." Mr. Bartholomew opined that Candidates with M.S. degrees in Electrical or Electronic Engineering were properly excluded because "[t]his position requires understanding of semiconductor thin film APCVD processing and device integration issues on a microscopic level, not just the knowledge of electrical components or electronic design suitable for large-scale circuit design." Finally, Mr. Bartholomew stated that candidates with M.S. degrees in Metallurgical, Ceramic, and Materials Engineering were properly excluded because "this position requires understanding of semiconductor device physics and thin film properties, not the knowledge of bulk materials properties that these engineers have instead." Mr. Bartholomew compared the requirement of an M.S. in Physics with that of the medical profession, "[t]here are many doctors, but few heart surgeons," and "the person disciplined in semiconductor device physics and thin film properties is the 'heart surgeon' in the semiconductor field" (AF 28).

In his brief, Counsel for the Employer states that Mr. Bartholomew's opinion, even though somewhat self-interested, should be fully credited because of his level of expertise regarding the technical nature of the position and its requirements (Employer's brief at 6-7). He also states that there is no indication that Mr. Bartholomew's self-interest is anything but a desire to recruit a qualified employee for the Employer (Employer's brief at 7).

Where a labor certification regulation does not require information to be in a specific form, and the CO has not made a request for a reasonably obtainable and relevant document, written assertions that are reasonably specific and indicate their sources or bases are to be considered *documentation*. *Gencorp*, 87-INA-659 (Jan. 13, 1988) (*en banc*). If a CO challenges the business necessity of a requirement, but does not request any specific type of documentation, an employer's statements may establish business necessity. *Greg Kare*, 89-INA-7 (Dec. 18, 1989). However, although a written assertion constitutes documentation that must be considered under *Gencorp*, a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. For example, unsupported conclusions (*i.e.*, statements without explanation or factual support) are insufficient to demonstrate that certain job requirements are normal for a position or supported by a business necessity. *Inter-World Immigration Service*, 88-INA-490 (Sept. 1, 1989), citing *Tri-P's Corp.*, 88-INA-686 (Feb. 17, 1989).

The burden of proof for obtaining labor certification lies with the employer. 20 C.F.R. § 656.2(b). Even granting that Mr. Bartholomew is an expert, and putting his self-interest aside, his letter is not sufficient documentation of the business necessity of the M.S. in Physics requirement, because it contains a number of unsupported assertions. Mr. Bartholomew states that the M.S. in Physics is a requirement "not atypical for this specific industry" (AF 28). However, there is no documentation that the Employer required such a degree from any other employees in the same job position, or that it was required by any other employers in the semiconductor industry. The Employer discussed an employee in the process engineer position with 3.5 years of experience in its rebuttal, but does not state or provide any documentation of his degree requirement (AF 27). Mr. Bartholomew's statements regarding the skills of Chemical, Electrical and Electronic, and Metallurgical, Ceramic, and Materials Engineers are simply unsupported assertions of his understanding regarding the skill levels of individuals with those degrees. After reviewing the resumes of the six U.S. applicants, it appears that many of them with the various engineering degrees stated above have skill levels much more diverse than those indicated by Mr. Bartholomew's analysis (AF 53-72). Moreover, the record indicates that at least three (Lee, Grover, and Pham) of the six U.S. applicants were rejected without an interview (AF 50-52). Of the three remaining applicants, one (Kumar) was rejected on the basis of a previous interview with the Employer, despite having a Ph.d in Physics, one (Chib) was rejected for lack of experience despite having an M.S. in Physics, and one (Leu) was rejected for not having an M.S. in Physics (AF 44-45). The Employer has simply not provided sufficient information to indicate that the requirement of an M.S. in Physics is essential to performing the job duties. See, *Information Industries, Inc.*, *supra*.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered this the ____ day of August, 2002, for the Panel:

Richard E. Huddleston

Judge Joel R. Williams, dissenting:

In *Gencorp, supra*, the Board held:

We are of the opinion that where a provision of the regulations requires information to be furnished in a specified form, e.g., documentation of experience ‘in the form of statements from past or present employers,’ Section 656.21(a)(3)(J), the regulation controls. In the absence of such a specific provision, where a document has a direct bearing on the resolution of an issue and is obtainable by reasonable efforts, the document *if requested by the CO* must be adduced. In all other cases, e.g. where an employer is required to prove the existence of an employment practice or the performance of an act and its results, written assertions which are reasonably specific and indicate their sources or bases shall be considered documentation. This is not to say that a CO must accept such assertions as credible or true; but he/she must consider them in making the relevant determination and give them the weight that they rationally deserve. (Emphasis added)

In *Greg Kare, supra*, it was held:

The Board of Alien Labor Certification Appeals (BALCA) has held that an Employer’s written assertions that are reasonably specific and indicate the source of the statement shall be considered documentation. (citing, *Gencorp*). In this case, the C.O. did not request any specific type of documentation to establish a business necessity. Therefore, the Employer’s statement can be considered documentation.

There are no provisions in the regulations which require specific documentation to establish “business necessity.” Indeed, the regulations do not even define the term. (See *Information Industries, Inc.*, 88-INA-82 (Feb. 9, 1989).) In the instant case, all the CO requested the Employer to do was to justify business necessity for the degree in physics. He requested no specific documentation. The CO was not satisfied with the Employer’s rebuttal but this was not because of the lack of any specific documentation, e.g., an opinion from an independent expert. Rather, the CO simply substituted his judgement for that of the Employer as to the necessity for the degree in physics.

I am satisfied that the Employer has furnished a detailed explanation as to why a degree in physics bears a reasonable relationship to the occupation here involved and is essential to perform the job duties. I note in this regard that there is corroboration in the record for the Employer’s assertions. After reviewing the Employer’s application (ETA 750), the California Employment Development Department, who would be expected to have expertise in the employment classification field, classified the position as a physicist (DOT 023.061.014).

Although I recognize that there were applicants for the position, the CO did not deny certification on the basis of their having been rejected. The Board has held that it is improper to

consider a ground for denial of certification which was not raised by the CO in the Final Determination. *Lowes Anatole Hotel*, 89-INA-230 (Apr. 26, 1991).

Joel R. Williams
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

*Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002.*

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.